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JAN 25 1995

No. 94-1039

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1994

ROY ROMER, as Governor of the State of Colorado, and the STATE OF COLORADO,
Petitioners,
vs.
RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, PRISCILLA INKPEN, JOHN MILLER, the BOULDER VALLEY SCHOOL DISTRICT RE-2, the CITY AND COUNTY OF DENVER, the CITY OF BOULDER, the CITY OF ASPEN, and the CITY COUNCIL OF ASPEN,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO
Case Nos. 94SA48 & 94SA128

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE & BRIEF AMICUS CURIAE OF COLORADO FOR FAMILY VALUES

in support of the *Petitioners*

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Colorado for Family Values (CFV), by its attorney, Robert K. Skolrood, of the National Legal Foundation, moves this court pursuant to Rule 21.2(b) of the Supreme Court of the United States for leave to file a brief amicus curiae in the aforementioned action to present arguments stating why the petitioners' request should be granted. This request is based on Rule 10.1(c) of the Supreme Court of the United States.

CFV spent thousands of dollars and innumerable hours in obtaining the passage of the Colorado state constitutional amendment at issue. CFV is in a unique position to illustrate the gravity of the Colorado Supreme Court's decision and its national significance.

The following parties, represented by counsel, have refused to consent to the filing of the attached brief amicus curiae:

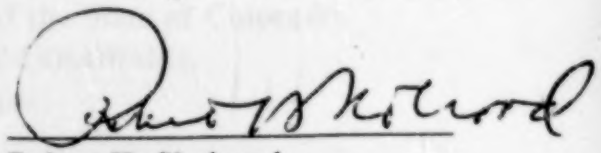
Jean E. Dubofsky, Lead Counsel
Representing: Richard G. Evans, Angela Romero, Linda Fowler, Paul Brown, Priscilla Inkpen, John Miller, and the Boulder Valley School District RE-2.
Refused Consent.

Edward M. Caswall, Esquire
Representing: The City of Aspen and the City Council of Aspen.
Refused Consent.

Joseph N. DeRaismes, III, City Attorney
Representing: The City of Boulder.
Refused Consent.

Darlene M. Ebert, Assistant City Attorney
Representing: The City and County of Denver.
Refused Consent.

The petitioners have consented to the filing of this brief amicus curiae.



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INTEREST OF AMICUS

Colorado for Family Values (CFV) is the grassroots organization which initiated and campaigned for the passage of Colorado's Amendment 2. The opponents of the constitutional amendment out-spent CFV almost 2 to 1 which required CFV to rely heavily on citizen volunteers. During the campaign the Denver television market which covers approximately 75 percent of the voters in Colorado refused to run CFV's advertisements. Despite this, CFV gathered approximately 85,000 signatures to place Amendment 2 on the ballot and hand-delivered over 700,000 information sheets about the amendment. When the voters of Colorado passed Amendment 2 the political pundits were astounded. Thus, CFV is naturally concerned about the continued vitality of Amendment 2.

CFV believes that states have the power to pass a wide variety of laws to protect the family and public morality. CFV desires to protect the integrity of our constitutional system of government by ensuring the sovereignty of the people.

The National Legal Foundation, CFV's counsel, assisted in drafting the language of Amendment 2 and participated as amicus curiae in this litigation at the state court level. The Foundation has participated as amicus curiae in several federal and state cases and served as lead counsel in *Board of Education of the Westside Community Schools v. Mergens*, 496 U.S. 226 (1990).

Counsel of record for amicus curiae is Robert K. Skolrood, the Foundation's Executive Director and General Counsel. Mr. Skolrood is licensed to practice in Illinois, Oklahoma, Virginia, and the District of Columbia, and is admitted to practice before the U.S. Supreme Court and numerous U.S. Circuit Courts of Appeal and District Courts.

STATEMENT OF THE CASE

On November 3, 1992, the people of Colorado, by popular initiative, passed by a vote of 813,966 to 710,151 (53.4% to 46.6%) Amendment 2 to the State Constitution. This amendment denied to the state and its political subdivisions power to enact any law "whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships" would "be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination." Colo. Const. art. II, § 30b (Amendment 2).

On November 12, 1992, Respondents filed suit in state district court seeking to enjoin the enforcement of Amendment 2. The trial court granted a preliminary injunction on the ground that Amendment 2 violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

On appeal, the Colorado Supreme Court affirmed. It held that "the Equal Protection Clause of the United States Constitution protects the fundamental right to participate equally in the political process," and "that any legislation or state constitutional amendment which infringes on this right by 'fencing out' an independently identifiable class of persons must be subject to strict judicial scrutiny." The Colorado Supreme Court concluded that Amendment 2 must be subject to the "strict scrutiny" test.

To satisfy strict scrutiny the trial judge assessed each interest proffered by Petitioners to determine if it was compelling and, if so, whether Amendment 2 was the least restrictive means to further that interest. The trial judge found none of the interests specified by Petitioners to be compelling enough to justify a constitutional amendment denying to state and local officials discretion to enact laws giving heightened protection to homosexuals, lesbians, and bisexuals. Consequently, the judge entered an order permanently enjoining the enforcement of Amendment 2. Petitioners appealed.

On appeal, the Colorado Supreme Court, conducted a de novo review. The court found compelling state interests. However, the high court concluded that Amendment 2 was not the least restrictive means to secure those interests. Having concluded that Petitioners "failed to establish that Amendment 2 is necessary to serve any compelling governmental interest in a narrowly tailored way," the state supreme court "affirm[ed] the trial court's entry of a permanent injunction barring its enforcement."

Pursuant to Rules 12 and 13 of the U.S. Supreme Court, Petitioners have now filed a petition to this Court for review on writ of certiorari. This brief amicus curiae is filed on behalf of Colorado for Family Values in support of the Petitioners.

REASONS FOR GRANTING THE PETITION

This Court should grant the requested petition for the following reasons.

I. The Colorado Supreme Court's Decision Is Contrary To This Court's Decisions And Its Settled Equal Protection Jurisprudence

The decision of the Colorado Supreme Court conflicts with the decisions of this Court in *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1 (1973), and in *Hunter v. Erickson,* 393 U.S. 385 (1969). Moreover, it departs significantly from this Court's definitive guidelines limiting the protection of "fundamental rights" under the Fourteenth Amendment's Equal Protection Clause.

A. The Decision Below Conflicts With San Antonio Independent School District v. Rodriguez

Prior to *Rodriguez* this Court found a number of fundamental rights entitled to strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment. Among these were the right of procreation, *Skinner v. Oklahoma,* 316 U.S. 535 (1942), the right to travel, *Shapiro v. Thompson,* 394 U.S. 618 (1969), the right to vote, *Dunn v. Blumstein,* 405 U.S. 330 (1972), and the right to engage in First Amendment activities, *Police Dep't of Chicago v. Mosley,* 408 U.S. 92 (1972).

Such rights, this Court held, could not be infringed by state law except upon proof of a compelling interest and further, upon proof that such interest could not be adequately protected by any other means. *See, e.g., Shapiro,* 394 U.S. at 634, 637. During this same period, however, the Court refused to find a number of other rights to be "fundamental" within the meaning of the Fourteenth Amendment's Equal Protection Clause. Among them were the right to public welfare assistance, *Dandridge v. Williams,* 397 U.S. 471 (1970), and a right to adequate housing, *Lindsey v. Normet,* 405 U.S. 56 (1972). As to these rights the Court held that they could be denied if the state could show a "rational"

basis for doing so. *See Dandridge*, 397 U.S. at 487.

In the *Rodriguez* case, this Court faced the question whether education was like the right to vote, a fundamental right subject to strict scrutiny, or like the right to public welfare assistance, subject to rational basis review. The Court concluded that education, like welfare, was not a fundamental right, and therefore, was subject only to the rational basis test. In the process of making this decision, this Court laid down two definitive guidelines for assessing future fundamental rights claims under the Equal Protection Clause of the Fourteenth Amendment.

First, the Court stated that "[i]t is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws." *Rodriguez*, 411 U.S. at 33. Thus, the Court laid to rest any notion that the Fourteenth Amendment's Equal Protection Clause gave authority to the Court to devise substantive equality rights based upon political, economic, or social assessments. *Second*, the Court limited "fundamental rights" to those which are found, explicitly or implicitly, in some provision of the constitution *other than the Equal Protection Clause of the Fourteenth Amendment itself. See id.*

The Colorado Supreme Court did not even cite *Rodriguez*, much less apply its definitive guidelines to determine if the right to participate equally in the political process is protected either explicitly or implicitly in a constitutional provision other than the Fourteenth Amendment's Equal Protection Clause. To the contrary, the Colorado court posited as its starting point a statement of political philosophy:

> The right of citizens to participate in the process of government is a core democratic value which has been recognized from the very inception of our Republic up to the present time.

Evans v. Romer, 854 P.2d 1270, 1276 (Colo. 1993), *cert. denied*, 126 L.Ed.2d 365 (1993) (*Evans I*).

The court made no effort whatsoever to demonstrate that this premise was derived from any right, either explicitly or implicitly guaranteed in the Constitution. To the contrary, the court found this right of political participation in two very different sources, a book written by a law professor and a student note in the Harvard Law Review. *Evans I*, 854 P.2d at 1276. Yet, this presupposition of political participation infected the rest of the court's opinion, especially its review of this Court's equal protection precedents.

First, this misconstruction drove the court's wide-ranging discussion of the right to vote cases. After admitting that all of "those decisions addressed entirely distinct questions and constitutional problems from those presented here,"[1] the court still derived an overarching principle from those cases to apply to the case before it:

> [W]hile all three categories of [voting] cases are distinguishable from the present controversy, the common thread which unites them with one another, and with the case before us, is the principle that laws may not create unequal burdens on identifiable groups with respect to the right to participate in the political process . . . .

Evans I, 854 P.2d at 1279.

Had the Colorado court paid attention to this Court's decision in *Rodriguez*, it would have recognized that this is the very kind of reasoning rejected by the first prong of the *Rodriguez* formula. *The Fourteenth Amendment's Equal Protection Clause does not, itself, create any substantive constitutional rights.*

1 *Evans I*, 854 P.2d at 1278.

The court below also disregarded *Rodriguez's* second prong. It did not search the Constitution to find whether it contained a right to participate equally in the political process. Rather, it turned to another line of equal protection cases and recast them to fit its preconceived philosophy of political participation.

Specifically, the Colorado court picked up *Hunter v. Erickson*, 393 U.S. 385 (1969) and its progeny (cases involving this Court's suspect class/equal protection analysis)[2] and wrongly characterized them as cases "involv[ing] legislation which prevent[] the normal political institutions and processes from enacting particular legislation *desired by an identifiable group of voters*." *Evans I*, 854 P.2d at 1279 (emphasis added). By recasting these cases to fit the court's political terminology, the court below was able to come up with its new fundamental right of equal participation in the political process.

This kind of analysis was explicitly rejected by this Court in *Rodriguez* as wholly inappropriate to the definition of a fundamental right for equal protection purposes. In *Rodriguez*, the appellees' attempted to characterize the right to an education as a fundamental right by claiming it was essential to two already recognized fundamental rights, freedom of speech and the right to vote. The essence of the appellees' argument was this: Education must be considered a fundamental right because without an education one cannot be an effective participant in the marketplace of ideas nor can one be an informed and intelligent voter. *Rodriguez*, 433 U.S. at 35-36.

2 *James v. Valtierra*, 402 U.S. 137 (1971); *Gordon v. Lance*, 403 U.S. 1 (1971); *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982).

The Court explicitly rejected this kind of approach to the fundamental rights question for two reasons. First, it smacked of political, not legal analysis, and therefore was outside the province of the Court. *Rodriguez*, 433 U.S. at 36. Second, it was "difficult to perceive" the "logical limitations" to plaintiffs' "nexus theory." *Id.* at 37. How, the Court asked, could education be distinguished from "the significant personal interests in the basics of decent food and shelter?"[3]

> Empirical examination might well buttress an assumption that the ill-fed, ill-clothed, and ill-housed are among the most *ineffective participants in the political process*, and that they derive the least enjoyment from the benefits of the First Amendment. If so, appellees' thesis would cast serious doubt on the authority of Dandridge v. Williams and Lindsey v. Normet . . . .

Rodriguez, 433 U.S. at 37 (citations and footnote omitted) (emphasis added).

If the Colorado Supreme Court's assessment of political effectiveness is allowed to stand as the foundation of a fundamental right, it will encourage future litigation and allow the courts to use it to demonstrate that identifiability and political powerlessness justify rulings that would ensure the poor's fundamental right to participate equally in the political process. The decision, then, poses a direct threat to this Court's limits on the fundamental rights/equal protection doctrine as stated in *Dandridge* and *Lindsey*, and authoritatively explained in *Rodriguez*.

Moreover, the Colorado decision will encourage litigants and courts to open the door once again to create substantive constitutional rights "having little or no cognizable roots in the language or design of the Constitution." *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986). Such fabrications threaten the very integrity of this Court and encroach upon matters left by the Constitution to other branches of the government or

3 *Rodriguez*, 433 U.S. at 37.

to the states. It was for these reasons that this Court limited the fundamental rights/equal protection doctrine in *Rodriguez*. *Rodriguez*, 411 U.S. at 29-33. This Court should not allow the Colorado Supreme Court to open a door that it has shut to itself.

B. The Decision Below Conflicts With Hunter v. Erickson

The Colorado Supreme Court ignored *Rodriguez* and the limits it placed on the fundamental rights/equal protection doctrine, while claiming that *Hunter* established a fundamental right to participate equally in the political process. *Evans I*, 854 P.2d at 1279. By construing *Hunter* as a fundamental rights case, the Colorado Supreme Court has placed itself in conflict with this Court's limited application of *Hunter* to cases involving race.

In *Hunter*, this Court struck down a voter enacted charter amendment preventing the city of Akron, Ohio from "implementing any ordinance dealing with racial, religious, or ancestral discrimination in housing without the approval of the majority of the voters of Akron." *Hunter*, 393 U.S. at 386. This Court in *Hunter* rested its conclusion not on the fundamental rights strand of equal protection, but upon principles rooted in the suspect classification soil of the Fourteenth Amendment:

> Because the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on race, racial classifications are "constitutionally suspect," and subject to the "most rigid scrutiny,"

Hunter, 393 U.S. at 391-92 (citations omitted) (quoting *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) and *Korematsu v. United States*, 323 U.S. 214, 216 (1944)).

Two years later this Court *twice* refused to extend *Hunter* beyond its racial context. One case involved a constitutional amendment requiring low-income housing developments to be approved by a majority of

voters. The other case concerned a state constitutional provision requiring approval by sixty percent of the people in a referendum election before a state subdivision could incur bonded indebtedness. In both cases, this Court explained that *Hunter* did not apply because the discrimination was not based on race. *James v. Valtierra*, 402 U.S. 137, 140-41 (1971); *Gordon v. Lance*, 403 U.S. 1, 5 (1971).

Eleven years later, this Court applied the *Hunter* precedent, but it did so in a case involving a constitutional amendment limiting the ability of local school boards to achieve racial balance in public schools. Once again this Court emphasized the impact that the limitation had on an identifiable racial minority, thereby triggering the "strict scrutiny" standard applicable to "suspect classifications" under the Fourteenth Amendment's Equal Protection Clause. Justice Blackmun made this point again and again in his majority opinion:

> In our view, Initiative 350 must fall because it . . . . uses the racial nature of an issue to define the governmental decision-making structure, and thus imposes substantial and unique burdens on racial minorities.
>
> . . . [D]espite its facial neutrality there is little doubt that the initiative was effectively drawn for racial purposes. . . .
>
> . . . .
>
> . . . The initiative removes the authority to address a racial problem--and only a racial problem--from the existing decisionmaking body, in such a way as to burden minority interests. . . .
>
> . . . .
>
> . . . [T]he charter amendment at issue in Hunter dealt in explicitly racial terms . . . giv[ing] rise to an impermissible racial classification. . . .
>
> Hunter . . . rested on a principle that has been vital for over a century--that "the core of the Fourteenth Amendment is the prevention of meaningful

and unjustified official distinctions based on race."

Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 470-71, 474, 485-86 (1982) (citations omitted).

Notwithstanding these crystal clear statements, the Colorado Supreme Court held that "the principle articulated in [*Hunter* and *Washington*] clearly is not one that can logically be limited to the 'race' context alone." *Evans I*, 854 P.2d at 1281 (footnote omitted). The only reason that the Colorado Supreme Court could make this statement is that it had already made up its mind that there was a fundamental right to participate equally in the political process and thus was forced to put forth some case from this Court as standing for that proposition. *Id.* at 1276. *Hunter* was the best it could do, and yet *Hunter* clearly stands for exactly the opposite proposition.

This kind of tendentious reading of this Court's precedents is simply indefensible. Such abuse of judicial power must be quickly checked lest other courts follow the Colorado Supreme Court's revisionist view of the *Hunter* and *Washington* precedents. The strict scrutiny test, designed to protect bona fide suspect classes, could be invoked by every ill-defined, self-identified group that claims that it has a constitutional right in order to press its political agenda before a state legislature or local government council.

II. The Decision Below Presents A Significant Federal Question Regarding The Right Of The People To Limit The Power Of Their Elected Representatives By Constitutional Means

Just over 30 years ago, this Court had before it a case from Colorado presenting the question whether the Fourteenth Amendment's Equal Protection Clause prohibited the people of the state of Colorado from establishing only one branch of its state legislature on the basis of population. *Lucas v. Forty-Fourth General Assembly of Colo.*, 377 U.S. 713 (1964). That case presented to this Court the important federal question whether the Court's newly-minted "one-person, one-vote" rule

would apply even when a majority of the people by popular referendum determined to adopt a bicameral legislative body patterned after the United States Congress.

The issue in this case is just as significant as the one in *Lucas*. This time the people claim the right to deny to their elected representatives the power to enact legislation that a particular political interest group wants. The interest group, in turn, has claimed that the Equal Protection Clause of the Fourteenth Amendment prohibits the people from placing such a constitutional limitation on their elected representatives.

As in *Lucas*, the power of the people is once again being challenged as violative of the Fourteenth Amendment's Equal Protection Clause. And, as in *Lucas*, it should be this Court, not some lower court, that should decide whether that Clause will now be constituted to limit the people's "original right to establish, for their future government, such principles, as, in their opinion, shall most conduce to their own happiness . . . . " *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

What was said by District Judge H. Jeffrey Bayless at the beginning of the Amendment 2 trial still rings true now.

> [W]hat I saw was a group of Colorado citizens who wanted to present an initiative to the voters. They said we would like the voters of Colorado to look at this. So they acquired signatures. They presented things to the state government. They followed the political process, and they got it on the ballot. And they lobbied . . . for the passage of the Amendment . . . .
>
> There is absolutely nothing wrong with that. As a matter of fact, that is exactly in keeping with the political process that this country is based on. And this Court, should there be an attack on that process, would vigorously defend those persons who have been

> involved with that process, because they have followed exactly what democracy urges. As a matter of fact, at every election, what you hear is to the voters, "Get involved. Go to your caucuses. Vote." That's exactly what they have done. There's nothing suspect about that.

Evans v. Romer, 60 Empl. Prac. Dec. (CCH) ¶ 41,998, at 73,837 (Colo. Dist. Ct., Jan. 15, 1993). *See also,* Petitioners' Pet. for Writ of Cert. at E-10, *Evans v. Romer*, 882 P.2d 1335 (Colo. 1994), *pet. for cert. filed*, (U.S. Dec. 12, 1994) (No. 94-1039).

Unfortunately, Judge Bayless' insightful observation did not impact his own decision-making.

Nonetheless, the right of the people to limit the power of their representations by a written constitution is a fundamental principle of American government. That right is reserved to the people of each state by the Tenth Amendment of the United States Constitution, except where specifically prohibited by that federal document.

From the beginning of the American republic, the people of each state have limited the powers of their own governments by written constitutions. In addition, the people of the United States have limited the powers of the States in the United States Constitution. The very purpose of some of these limitations is to remove a number of subjects from the ordinary political processes in the States. *See, e.g.*, U.S. Const. art. I, § 10, cl. 1.

III. The Colorado Supreme Court's Decision Imperils Federal & State Legislation

The Colorado Supreme Court's marriage of fundamental rights cases and suspect class cases has given birth to a constitutional nightmare. If this "marriage" is not "annulled" by this Court, its consequences will reverberate throughout the nation. As other state and federal courts

adopt the perilous analysis of the court below, innumerable federal and state statutes, state constitutional provisions, and municipal ordinances and charter provisions -- whose validity was previously unquestioned -- will be subject to strict scrutiny.[4]

The court below contends that "the Equal Protection Clause of the United States Constitution protects the fundamental right to participate equally in the political process, and that any legislation or state constitutional amendment which infringes on this right by 'fencing out' an independently identifiable class of persons must be subject to strict judicial scrutiny." *Evans I*, 854 P.2d at 1282 (footnote omitted). If this is true, "the courts will be very busy indeed." *Bowers*, 478 U.S. at 196. Application of the Colorado Supreme Court's novel principles to a sampling of constitutional provisions will illustrate this point.

The First Amendment to the U.S. Constitution provides, "Congress shall make no law respecting an establishment of religion."[5] The New York State Constitution provides, "Neither the state nor any subdivision thereof, shall use its property or credit or any public money . . . directly or indirectly, in aid or maintenance . . . of any school or institution of learning wholly or in part under the control or direction of any religious denomination."[6] The Florida State Constitution provides, "No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution."[7]

Applying the novel analysis of the court below, all such provisions would be subjected to strict scrutiny. Any number of religious groups would qualify as an independently identifiable class apart from the amendments in question. The establishment clauses fence out of the political process religionists in general and more specifically, to name a

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4 "Only rarely are statutes sustained in the face of strict scrutiny." *Bernal v. Fainter*, 467 U.S. 216, 219 n.6 (1984).

5 U.S. Const. amend. I.

6 N.Y. Const. art. XI, § 3.

7 Fla. Const. art. 1, § 3.

few, Jews, Christians, Catholics, Protestants, Baptists, Presbyterians, Lutherans, and Methodists. This fencing out is accomplished in the same manner that Amendment 2 fences out homosexuals and bisexuals -- the establishment clauses "single[] out" and "prohibit[]" religionists "from seeking governmental action favorable to [them] and thus, from participating equally in the political process." *Evans I*, 854 P.2d at 1285 (footnote omitted).

The Colorado Supreme Court's decision below, if left unreversed, will inevitably pit the Fourteenth Amendment's Equal Protection Clause against a number of traditional constitutional guarantees, both state and federal. Such a bizarre prospect is reason enough for this Court to grant petitioner's request for review.

IV. The Right Of The People To Address The Issue Of Homosexual Rights By Amendment To Their Fundamental Law Is At Stake

The issue of homosexual rights, although primarily a state and local one, is not confined to the State of Colorado. Nor is the strategy to take that issue out of the hands of state and local legislative bodies limited to that state. To the contrary, the people of a number of states and localities have taken the initiative by constitutional amendment or city charter amendment to remove from their elected representatives the power to make homosexuals a legally protected class.

In 1994 alone, movements were undertaken in at least seven states (Arizona, Florida, Maine, Michigan, Missouri, Nevada, and Oregon) to amend the state constitutions to accomplish the same objectives of Amendment 2, and in at least two states (Idaho and Washington) passage of statutes with similar objectives was attempted.[8] In cities and counties such as Cincinnati, Ohio; Lewiston, Maine; Springfield, Missouri; Austin, Texas; and Alachua County, Florida, voters repealed or prohibited special protection based on homosexual conduct or

8 *Summary of 1994 Anti-Gay/Lesbian/Bisexual Ballot Initiatives*, National Gay & Lesbian Task Force Policy Institute, (Washington, D.C.) July 12, 1994; *National News*, The Washington Blade, Jan. 28, 1994, at 20-21.

orientation.[9] All such amendments or legislation will undoubtedly fall under the new equal protection analysis.

Conversely, as of May 1993, at least 139 jurisdictions had some form of homosexual rights legislation.[10] Pro-homosexual legislation will, of course, remain untouched by the Colorado Supreme Court's equal protection endeavors.

The homosexual rights issue is at the heart of an ongoing debate. The recent efforts of the two sides demonstrate that the political zeal and determination is building, not abating.[11] This Court should not permit the court below to give one side of this political debate an illegitimate "constitutional" advantage by invalidating legitimate and successful political achievements. If the analysis of the court below is not rejected, it will "foreclos[e] all democratic outlet for the deep passions this issue arouses," will "banish[ ] the issue from the political forum that gives all participants, even the losers, the satisfaction of a fair hearing and an honest fight," and will impose "a rigid national rule instead of allowing for regional differences . . . ." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 60 U.S.L.W. 4795, 4842 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part).

The City of Cincinnati is a case in point. On November 2, 1993, the people of Cincinnati overwhelmingly approved an amendment to the city's charter denying to the city council the power to treat "homosexual, lesbian, or bisexual orientation, status, conduct, or relationship" as a class deserving of "minority or protected status, quota

9 Jim Simon, *Gay-Rights Fight Takes National Stage, Conservative Groups See 'Clash Of Two Belief Systems,'* Seattle Times, May 29, 1994, at B1; Edith Paal, *National Group May Join Gay-Rights Fight*, Gainesville Sun, Nov. 12, 1994, at 1B.

10 Note, *Constitutional Limits on Anti-Gay-Rights Initiatives*, 106 Harv. L. Rev. 1905, 1923-25 (1993).

11 Pro-morality groups have pledged to continue the fight. *OCA* (Oregon Citizens Alliance) *Looks To Next Ballot Issue*, Statesman Journal (Salem, Or.), Nov. 10, 1994, at 3A; *Anti-Gay Rights Group Submits Petitions To Force Referendum*, Sun-Journal (Lewiston, Me.), Aug. 23, 1994, at 3; Letter from Kelly Walton, Chairman, Idaho Citizens Alliance (ICA) to ICA friends (Dec. 1994) (Heyburn, Idaho).

preference or other preferential treatment." Cincinnati, Ohio, Charter, art. XII (Nov. 2, 1993). Seventeen days later, a federal district judge granted a preliminary injunction against the enforcement of the charter amendment. *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati,* 838 F.Supp. 1235, 1243 (S.D. Ohio 1993) (*Equality I*). Nine and one-half months after that the judge entered a permanent injunction. *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati,* 860 F.Supp. 417, 449 (S.D. Ohio 1994) (*Equality II*). To support both of his rulings, the federal trial judge relied heavily upon the Colorado Supreme Court's decision below. *Equality I,* 838 F.Supp. at 1238-42; *Equality II,* 860 F.Supp. at 430-31.

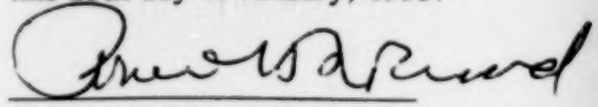
The Cincinnati, Ohio decision is on appeal to the United States Court of Appeals for the Sixth Circuit, and has not yet been decided. However, there is very good reason to believe that the Court of Appeals will reverse because it has previously acknowledged that *Hunter* is a suspect classification/equal protection case, not a fundamental rights/equal protection case. *Arthur v. City of Toledo,* 782 F.2d 565, 571 (6th Cir. 1986).

Not only is there an existing conflict between the Colorado ruling below and the Sixth Circuit's reasoning in *Arthur* -- a conflict likely to be exacerbated by the Sixth Circuit's ruling on *Equality I and II* -- but there is also an existing conflict with other jurisdictions which have cited *Hunter* as a suspect classification case. *See, e.g., Flores v. Pierce,* 617 F.2d 1386, 1391 (9th Cir. 1980), *cert. denied sub nom. Antry v. Flores,* 449 U.S. 875 (1980); *Kills Crow v. United States,* 451 F.2d 323, 325 (8th Cir. 1971), *cert. denied,* 405 U.S. 999 (1972); *Peyote Way Church of God, Inc. v. Thornburgh,* 922 F.2d 1210, 1214-15 (5th Cir. 1991); *Habron v. Epstein,* 412 F.Supp. 256, 259 (D. Md. 1976), *aff'd.,* 429 U.S. 802 (1976); *Hall v. Pennsylvania State Police,* 570 F.2d 86, 90 (3rd Cir. 1978); *Upshaw v. McNamara,* 435 F.2d 1188, 1190 (1st Cir. 1970).

CONCLUSION

For the reasons stated herein, the petition for writ of certiorari should be granted.

Respectfully submitted
this 25th day of January, 1995.



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